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No. 87-352

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

SUN OIL COMPANY,
Petitioner.

vs.

RICHARD WORTMAN and HAZEL MOORE, Individually
and as representatives of all producers and royalty owners
to whom Sun Oil Company has made or should make pay-
ment of suspended proceeds or royalties pursuant to FPC
opinions or FERC,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF KANSAS

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Do the Due Process Clause, and the Full Faith and Credit Clause of Article IV of the Constitution, require the forum state to apply the limitations law of the state where the claim arose and claimant resides? In this connection, should *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953), be overruled; or should Wells' broad dictum that "the Full Faith and Credit Clause does not compel the forum state to use the period of limitation of a foreign state" be circumscribed to apply only when the forum state's limitations statute is shorter than that of the state wherein the claim arose?

2. Under the holding in *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985), that the Due Process Clause and the Full Faith and Credit Clause require Kansas state courts, in a multi-state class action, to apply the differing laws of other states to claims for interest arising in each of those states,

(a) must the limitations laws of each of the states wherein the claims arose be applied, and

(b) can the forum state constitutionally disregard the interest rates specified by the other states for similar claims, by ruling that each of those states would adopt the different theory of interest liability adhered to by the forum state?

STATEMENT PURSUANT TO RULE 28.1

Sun Oil Company's name has been changed to Sun Exploration and Production Company, the parent company of which is Sun Company, Inc. The assets of Sun Exploration and Production Company have been transferred to Sun Energy Partners, L.P., of which Sun Exploration and Production Company is the managing general partner. The non-wholly owned subsidiaries of Sun Exploration and Production Company are Canyon Reef Carriers, Inc., East Texas Salt Water Disposal Company and Van Salt Water Disposal Company. The non-wholly owned subsidiary of Sun Company, Inc., is Suncor, Inc.

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**ON WRIT OF CERTIORARI TO THE SUPREME COURT
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BRIEF FOR PETITIONER

OPINIONS AND JUDGMENT BELOW

The opinion of the Supreme Court of Kansas (J.A. 145), is reported in 241 Kan. 226, 734 P.2d 1190. The order denying rehearing and modifying the opinion (J.A. 156) has not yet been published. The unpublished decision and judgment of the District Court of Barber County, Kansas, is at J.A. 129.

The foregoing opinions and judgment followed this Court's October 7, 1985, Order and Mandate (J.A. 125) in No. 84-1971, 106 S.Ct. 40, vacating an earlier state court decision, 236 Kan. 266, 690 P.2d 385 (J.A. 113), and district court judgment. (J.A. 95).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3), by petitioner's claim of rights under the Constitution of the United States. The opinion of the Supreme Court of Kansas was entered on March 30, 1987. A timely motion for rehearing was filed on April 17, 1987, and was denied by order entered on June 8, 1987. The Petition for a Writ of Certiorari was filed on August 28, 1987, within 90 days as prescribed by 28 U.S.C. §2101(c). The Petition was granted on October 19, 1987.

CONSTITUTIONAL PROVISIONS INVOLVED

Article IV, Sec. 1 of the Constitution of the United States provides:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

The Fourteenth Amendment to the Constitution provides in pertinent part:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . .

STATEMENT OF THE CASE

This action was filed on August 23, 1979, in the District Court of Barber County, Kansas, by plaintiffs Wortman (a citizen of Kansas) and Moore (a citizen of Oklahoma), against Sun Oil Company, a Delaware corporation, seeking recovery of interest. Plaintiffs sued individually and as representatives of a class composed of Sun's royalty owners who owned royalty interests in gas wells owned and operated by Sun in the states of Texas, Oklahoma, Louisiana, New Mexico, Mississippi, and Kansas. (J.A. 4; Defs. Ex. A, J.A. 93; R. Vol. 2, p. 72, Vol. 3, p. 28). Sun's gas production and sales, and payment of royalties, were handled from its place of business in Texas. (J.A. 35-39; 69 et seq.).

In July, 1976, Sun paid additional gas royalties totaling \$1,167,000 to 981 class members. These royalties had accumulated and been held in suspense while the legality of increased rates for which Sun sold the gas, at rates permitted by Federal Power Commission Orders Nos. 699/699H, was being decided. Sun had collected the increased rates, subject to refund if found to be unreasonable. Sun did not pay interest on the funds during the time it had accumulated the increases prior to payout. Only 7 of the 981 class members resided in Kansas, receiving less than 0.006% of the payout. Sun sold the gas to pipeline companies from 670 properties, 43.7% in Texas, 24% in Oklahoma, 22.8% in Louisiana, 3.9% in New Mexico, 3.4% in Mississippi, and 2.1% in Kansas. (Defs. Ex. A, J.A. 93; R. Vol. 2, p. 72, Vol. 3, p. 28).

In April, 1978, Sun paid additional gas royalties totalling \$2,676,000 to 1,353 class members. These funds had similarly accumulated pending rate increase approvals

permitted by FPC Orders 770/770A. Only 14 of the class members resided in Kansas, receiving less than 0.5% of the funds. Sun sold the gas to pipeline companies from 690 properties, 40.3% in Texas, 31.6% in Oklahoma, 23.6% in Louisiana, 3.3% in New Mexico, 0.9% in Mississippi, and 0.3% in Kansas. (Defs. Ex. A, J.A. 93; R. Vol. 2, p. 72, Vol. 3, p. 28).

Sun denied liability on the ground that it had no legal obligation to pay the suspended royalty increase until final federal commission approval of the gas rate increase; and affirmatively pled limitations as a bar to all interest claims arising from the July, 1976, royalty payout. Sun asserted that the laws of each of the states in which gas was sold and royalties were paid must govern the claims for interest; and that the Due Process clause of the 14th Amendment and the Full Faith and Credit Clause of Article IV, Sec. 1, of the Constitution of the United States, required the application of those state laws. (R. 141, 154; J.A. 9, 55).

The Kansas district court ruled that Sun was liable for interest at rates required by Kansas law, and that the law of the other states did not apply. (J.A. 95). The Kansas Supreme Court affirmed, *Wortman v. Sun Oil Company*, 236 Kan. 266, 690 P.2d 385 (1984) [J.A. 113], basing its decision on *Shutts v. Phillips Petroleum Company*, 235 Kan. 195, 679 P.2d 1159 (1984), a similar class action interest case. The Court approved an earlier Kansas ruling "that the law of the forum pertaining to interest was applicable rather than the laws of the various states of residence of the plaintiffs." It applied the Kansas five year statute of limitations, thus denying Sun's limitations defense to liability for interest on the July, 1976, royalty payout. (J.A. 118, 122-3; 690 P.2d at 389, 391).

This Court then decided *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985), approving Kansas' use of the multi-state plaintiff class action procedure, but reversing Kansas' *Shutts* decision that Kansas law was applicable to the interest claims arising in other states. The laws of the non-forum states were applicable because Kansas did not have "... a significant contact or significant aggregation of contacts, creating state interests, such that the choice of its law is neither arbitrary nor fundamentally unfair", as required by *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) [472 U.S. at 818]. *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930), which held unconstitutional Texas' application of its limitations law to a foreign claim, was also cited by this Court for the principle that Kansas "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them." (472 U.S. at 822). On October 7, 1985, this Court granted Sun's petition for a writ of certiorari asking this Court to review Kansas' denial of Sun's constitutional rights in *Wortman*. The Kansas judgment was vacated and the cause remanded for further consideration in light of *Phillips Petroleum Company v. Shutts*, 472 U.S. 797. (*Sun Oil Company v. Wortman*, No. 84-1971, 106 S.Ct. 40) [J.A. 125].

After remand by this Court, the Kansas Supreme Court in turn remanded back to the state district court for further consideration. (J.A. 128). The district court's further consideration consisted of copying *verbatim* the requested findings and conclusions submitted by plaintiffs (R. 293), which were to the effect that each of the non-forum states wherein the nonresident class members' claims arose would adopt the same theory of interest developed by the Kansas courts. (J.A. 129-140). Thus,

a uniform interest rate was applied to all claims. Sun's limitations defense was rejected without discussion of the federal constitutional issue raised concerning the limitations laws of the other states. (J.A. 138-9).

On Sun's appeal, the Kansas Supreme Court affirmed the district court view that Texas, Oklahoma, Louisiana, New Mexico and Mississippi would each adopt the Kansas contract and equity theory of interest, *Wortman v. Sun Oil Company*, 241 Kan. 226, 734 P.2d 1190 (1987) [J.A. 145], basing this conclusion on its analysis in *Shutts v. Phillips Petroleum Co.*, 240 Kan. 764, 732 P.2d 1286 (1987), decided after the reversal and remand by this Court of Kansas' earlier *Shutts* decision. The last *Shutts* decision paid little heed to this Court's prior opinion reversing Kansas' application of Kansas law on the basis of clearly apparent differences in the interest laws of Texas, Louisiana and Oklahoma. (472 U.S. at 816-818). Instead, the Kansas court decided that each of the other states would uniformly adopt the Kansas theory.

In a curious twist, the Kansas court also ruled that the differing post-judgment interest rates of each of the other states should apply to the portions of the Kansas judgment covering the claims from each of the states—although that issue was not previously before this Court and was never raised by the parties. (J.A. 150).

The Kansas court rejected Sun's contention that the Full Faith and Credit Clause and the Due Process Clause of the Constitution required the limitations statutes of the states in which the claims arose to be applied to claims arising in those states. Reciting an oft-repeated view that limitations laws are "remedial or procedural", the court held that this Court's *Phillips* decision did not require ap-

plication of the other states' statutes of limitations. 734 P.2d at 1195. (J.A. 155). It applied the Kansas five year statute, although the limitations laws of Texas, Oklahoma and Louisiana, representing over 90% of the claims, would bar those claims arising from Sun's July, 1976, payout of royalty principal.¹

Sun's motion for rehearing was denied, but the Kansas court modified its opinion, by construing the Kansas "borrowing" statute, K.S.A. §60-516² to be inapplicable,

1. The statutes in effect when this suit was filed were as follows:

Vernon's Texas Statutes, Art. 5526:

"There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

4. Actions for debt where the indebtedness is not evidenced by a contract in writing.

... ." [See, *Hull v. Freedman*, 383 S.W.2d 236 (Tex.Civ.App.) 1964].

La. Civ. Code, Art. 3538:

"The following actions are prescribed by three years:

That for arrearages of rent charge, . . ."

[See, *O'Neal v. Union Production Co.*, 153 F.2d 157, 158, n.2 (1946), three year statute applies to all royalties under an oil and gas lease].

12 Okla. Stat. Ann. §95:

"Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

Second. Within three years: An action upon a contract express or implied not in writing; . . ."

2. K.S.A. §60-516 provides: "Where the cause of action has arisen in another state or country and by the laws of the state or country where the cause of action arose an action cannot be maintained thereon by reason of lapse of time, no action can be maintained thereon in this state except in favor of one who is a resident of this state and who has held the cause of action from the time it accrued."

"because it applies only where the cause of action has arisen in another state. Here, the cause of action arose in Kansas as well as in Texas, Oklahoma, Louisiana, New Mexico, and Mississippi." (J.A. 157).

The court repeated its holding that Kansas law applied because: "limitations statutes are considered as being remedial or procedural in their application, and do not affect the substantive rights of the litigants. 51 Am. Jur. 2d, Limitation of Actions, §21, p. 605. Accordingly, we hold that *Phillips* does not require application of the various states' statutes of limitations." (J.A. 156).

On October 19, 1987, this Court granted Sun's petition for a writ of certiorari seeking review of these rulings adverse to Sun on its claim of constitutional right under the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV, Sec. 1, of the Constitution.

SUMMARY OF ARGUMENT

I.

The forum state, Kansas, may not constitutionally apply its longer limitations law to the interest claims of nonresident class members because those claims arise from transactions with which Kansas has no contact. The Full Faith and Credit Clause and the Due Process Clause require the State applying its substantive law to have "a significant contact or significant aggregation of contacts, creating state interests, such that the choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312, 313 (1981). *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985) establishes that Kansas does not have the "significant contact

or aggregation of contacts" sufficient to constitutionally apply its substantive law to those transactions.

Limitations laws are substantive in nature because they define the time period during which the claimant may seek judicial relief. They are outcome-determinative. In this very case, Sun is not liable at all for interest on the July, 1976, royalty payout in Texas, Oklahoma and Louisiana. This is surely just as substantive as the fact that Texas law imposes a 6% rate whereas Kansas imposes a higher rate of interest on Sun's 1978 payout. Limitations laws represent the considered policy of the *lex loci* that a claim may be maintained until, but only until, the expiration of the limitations period. They are not merely procedural rules which govern how an action may be commenced and maintained, or remedial rules which select one of several remedies. The contrary ruling in *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953), mechanically applied the early precedent established by *M'Elmoyle v. Cohen*, 16 Pet. 312 (1839).

M'Elmoyle v. Cohen was wrongly decided, in a manner strikingly similar to *Swift v. Tyson*, 16 Pet. 1 (1842), due to reliance on English precedent governing the manner in which the English courts extended comity to the laws of foreign nations. That comity, reluctantly recognized, did not extend to the limitations law of the foreign state where the claim arose, it being rationalized that limitations went to the "remedy". Justice Story, sitting as a circuit justice in *Le Roy v. Crowninshield*, 15 F.Cas. 362, 2 Mason. 151 (1820), applied that English doctrine as a general common law conflict of laws solution, without reference to any constitutional right. Making a detailed analysis, Justice Story conceded that a "right cannot be said to subsist" when a limitations law barred any remedy;

but that he must rule to the contrary because "The error . . . is too strongly engrafted into the law to be removed without the interposition of some superior authority."

When *M'Elmoyle v. Cohen* was later decided, that arbitrary classification of limitations statutes as affecting only the "remedy" had become part of the warp and weave of judicial philosophy to the point that it became true for all purposes, despite the Full Faith and Credit Clause and regardless of the doctrine's inherent irrationality. The constitutional concept of a union of States who must give full faith and credit to each other's laws thus became crippled and altered by a technical common law doctrine developed by English law for reasons utterly inconsistent with the very purpose and structure of our "united" States and with the Full Faith and Credit Clause cementing that Union.

Both *M'Elmoyle* and *Tyson* were decided by the same court when technical common law judicial philosophy prevailed. Both decisions led to long and serious constitutional wrong. *M'Elmoyle* and its progeny, including *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, should be overruled because they establish unconstitutional doctrine which "no lapse of time or respectable array of opinion should make us hesitate to correct". *Erie R. Co. v. Tompkins*, 304 U.S. at 79 (quoting Justice Holmes).

The adoption of the Fourteenth Amendment to the Constitution long after the *M'Elmoyle-Tyson* era, and the ensuing concept of fairness mandated by its Due Process Clause, reinforce and compel these conclusions. An important element of fairness in this context "is the expectation of the parties" that they will not be affected by the law of a forum state having no relation to the transaction

involved. *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 822.

Guaranty Trust Co. v. York, 326 U.S. 99 (1945), required federal courts in diversity cases to apply the limitations law of the state where it was located and whose law governed the claim. In so holding, this Court rejected the view that limitations statutes were merely procedural or remedial. The basic reasoning behind that rule requires the same result when a state is constitutionally obliged to apply the law of another state, as in the present case.

Legal scholars have severely criticized the rule stated in *Wells v. Simonds Abrasive Co.* as constitutionally unsound. The rule encourages indiscriminate forum-shopping by litigants in state and federal courts. Under it a claim may be alive or dead, depending on where suit is filed. The result is to encourage and allow disparate treatment of claims depending on where litigants can prosecute them.

The suggestion by some legal scholars that a forum state may constitutionally apply its shorter limitations statute is not an adequate solution. It is but a partial palliative, and an undue concession to long-established but unsound doctrine. A state having no interest, other than the filing of the suit, in the controversy, has insufficient interest to apply its shorter (or longer) statute of limitations to the claim from another state. In many instances, as in *Wells*, applying the shorter limitation of the forum would effectively deprive plaintiff of any remedy at all.

In the present case, Kansas utilized its longer five year limitations law to breathe life into foreign claims already dead. This result can only encourage forum-

shopping on a massive and continuing scale, in state courts as well as federal courts. But the proper solution to the problem is to recognize and treat limitations laws as substantive in nature for constitutional purposes, thus requiring the forum state having no contacts with the operative facts to apply the law of the state where the claim arose. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 519 (1953) (Justices Jackson, Black and Minton, dissenting). Due process of law, not considered in *Wells*, in any event requires the same result.

II.

The decision below conflicts with *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985), which directed the Kansas courts to apply the differing laws of Texas, Oklahoma and Louisiana governing claims for interest. Rather than applying the existing interest laws of those states, Kansas has ventured to predict that the other states would adopt the Kansas contract and equity theory of interest despite differing state constitutional and statutory rates and despite binding judicial precedent from those states.

In *Phillips*, this Court observed that Texas recognizes interest liability for suspended royalties, but that "Texas has never awarded any such interest at a rate greater than 6% which corresponds with the Texas constitutional and statutory rate. . . . See *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (Tex. 1978); . . ." (472 U.S. at 817). Upon remand, however, the Kansas court decided that Texas permits a higher equitable rate in such actions, and would adopt the Kansas theory, despite this Court's analysis and in the face of a later Texas decision rejecting all attempts to in-

crease a rate above 6% per annum as awarded in *Stahl*, supra. *Mo.-Kan.-Tex. R. Co. v. Fiberglass Insul.*, 707 S.W. 2d 943 (Tex. Civ. App. 1986) (Error Refused, NRE, June 25, 1986). In a similar manner, the Kansas court disregarded Oklahoma and Louisiana law, which this Court observed were in apparent conflict with Kansas law. (472 U.S. at 817).

Given clear statutory law and judicial precedent, the forum state cannot be permitted to evade that existing, governing law by determining that the forum state has developed legal theories which the other state would adopt if and when presented to its courts. Otherwise, the constitutional limitations upon states having no connection with the claims in suit can easily and regularly be evaded, and rendered for naught by theories of what another state's law ought to be, rather than what it is.

ARGUMENT

I.

The Due Process Clause and the Full Faith and Credit Clause Require the Forum State to Apply the Limitations Law of the State Where the Claim Arose and Claimant Resides Because That Law, Being Outcome-Determinative, Is Substantive in Nature

In refusing to apply the shorter limitations laws of the states where the plaintiff class members' claims for interest arose, the lower court repeated what has become a black letter rule of conflicts law, that "limitations statutes are considered as being remedial or procedural in their application, and do not affect the substantive rights of the litigants." (J.A. 155). The court thereby shunted

aside any meaningful analysis of *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985), mechanically concluding that the constitutional requirement of *Phillips* applied only to the "substantive" rights relating to interest. (J.A. 155).

The present challenge to this ancient shibboleth might be approached with less temerity were it not for the doctrine's inherent irrationality; the growing body of academic and judicial criticism of the rule; and this Court's own observation reserving comment on its views, expressed in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778, n.10 (1984). Since the doctrine, we believe, is plainly wrong, being rooted in historical judicial error, we need not traverse the same analytical paths already taken by scholars discussing the subject.³

We start with *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985), because it is factually indistinguishable from the present case, in that virtually all of the claims for interest arose in favor of nonresidents of Kansas arising from transactions in other states. Kansas did not have a "significant contact or significant aggregation of contacts" to the claims asserted by each member of the plaintiff class. Absent those "contacts" Kansas had a lack of "'interest' in claims unrelated to that State. . ." (472 U.S. at 821, 822). Thus the application of its differing law to the out-of-state claims was "suffi-

3. R. Weintraub, Commentary on the Conflict of Laws, Sec. 9.2B, p. 517 (2d ed. 1980); Martin, Constitutional Limitations on Choice of Law, 61 Cornell L.Rev. 185, 221 (1976); Comment, The Statute of Limitations and the Conflict of Laws, 28 Yale L.J. 492, 496-497 (1919).

A recent review citing most of the voluminous literature is Grossman, Statutes of Limitations and the Conflict of Laws: Modern Analysis, 1980 Ariz. St. L.J. 1, 44.

ciently arbitrary and unfair as to exceed constitutional limits." (472 U.S. at 822).

Citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-313 (1981) as requiring those conclusions, this Court in *Phillips* related "fairness" to the "expectation of the parties":

"When considering fairness in this context, an important element is the expectation of the parties. . . There is no indication that when the leases involving land and royalty owners outside of Kansas were executed, the parties had any idea that Kansas law would control. Neither the Due Process Clause nor the Full Faith and Credit Clause requires Kansas 'to substitute for its own [laws], applicable to persons and events within it, the conflicting statute of another state', . . . but Kansas 'may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.' *Home Ins. Co. v. Dick*, supra, at 410. . ."

Allstate Ins. Co. v. Hague also accepted the due process analysis of *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), which involved a Mexican contract for a shorter limitation period than the limitations statute of the forum. Although plaintiff was a nominal resident of Texas, the Court held that application of the longer Texas limitations law to extend the contract's limitation-of-actions clause violated due process. The insurance contract was issued in Mexico to a Mexican citizen covering a Mexican risk—and thus did not involve potential application of the Full Faith and Credit Clause.⁴

4. On the other hand, *Clay v. Sun Insurance Office, Ltd.*, 377 U.S. 179 (1964), upheld the constitutionality of applying the

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United Commercial Travelers v. Wolfe, 331 U.S. 586 (1947), held that the Full Faith and Credit Clause required South Dakota to apply the limitations period contained in an Ohio fraternal benefit society's constitution, to a death benefit claim provided by it although the decedent member had been a South Dakota resident and South Dakota declared such contract limitations invalid.⁵

Accordingly, a contractual limitation period agreed to by the parties in another state must be applied by the forum state, upon due process and full faith and credit grounds, when the forum state has insufficient contacts with the claims asserted. Since a limitation statute determines the enforceability of a claim in court, like other defenses, logic would seem to require application of the same constitutional principle. That is, a limitations law is just as substantive in nature as a contract limitation, and is not a mere procedural rule. Virtually all of the scholars considering this issue agree that a limitations law is substantive, although their approaches vary. Grossman, *Statutes of Limitations and the Conflict of Laws: Modern Analysis*, 1980 *Ariz. St. L.J.* 1, 17-18; Martin, *Statutes of Limitation and Rationality in the Conflict of Laws*, 19 *Washburn L.J.* 405, 420 (1980).

But *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 517 (1953), relying upon a line of authority commencing with

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longer limitations law of the forum, after the insured moved from Illinois, where the policy containing the shorter time limitation provision was issued, to Florida where the property loss occurred.

5. In requiring full faith and credit to be given the shorter limitation period provided in the society's constitution, the Court distinguished the authorities allowing a forum state to apply its limitations period in preference to statutes of limitation in effect where the claim arose. That rule was not questioned by the parties. 331 U.S. at 607.

M'Elmoyle v. Cohen, 13 Pet. 12 (1839), stated in its 5-3 majority ruling:

"Our prevailing rule is that the Full Faith and Credit Clause does not compel the forum state to use the period of limitation of a foreign state."

The plaintiff in *Wells*, being unable to serve defendant in Alabama where the plaintiff's decedent was killed, sued in federal district court in Pennsylvania where defendant was incorporated for damages under Alabama's wrongful death statute, which included a two year limitations period for bringing suit. This Court upheld judgment barring the action based on Pennsylvania's one year limitations period. The Due Process Clause apparently was not invoked or discussed.

Plaintiff argued that Alabama's two year limitations period was "built-in" to its wrongful death statute, making it substantive in nature. But the Court, citing its prevailing rule "that the Full Faith and Credit Clause does not compel the forum state to use the period of limitation of a foreign state", held that differences based on special limitations periods of a foreign state "are too unsubstantial to form the basis for constitutional distinctions under the Full Faith and Credit Clause." 345 U.S. at 517-518.

Justice Jackson's dissent pointed out the majority rule's encouragement of forum-shopping by litigants generally, and specifically "via the forum non conveniens route". This aspect alone "opens up possibilities of conflict, confusion and injustice greater than anything *Swift v. Tyson*, (US) 16 Pet. 1, 10 L.Ed. 865, ever held." (345 U.S. at 522). Moreover, Justice Jackson continued, general statutes of limitations are a part of the single bundle of substantive rights, as applied in *Guaranty Trust Co.*

v. York, 326 U.S. 99 (1945). In particular, special limitations periods contained in statutes creating the right itself had generally been considered substantive. (345 U.S. at 524-526). The Full Faith and Credit Clause, therefore, should require the federal court in Pennsylvania to apply Alabama's two year limitations period.

The majority holding in *Wells* followed what had long ago become a rote recitation, that limitations affects only the remedy not the right—a doctrine arising from the early parochialism of English common law. Grossman, *Statutes of Limitations and the Conflict of Laws: Modern Analysis*, 1980 Ariz. L.J. 1, 5; Comment, *The Statute of Limitations and the Conflict of Laws*, 28 Yale L.J. 492, 496.⁶ This common law aspect of comity was first utilized to deny application of the Full Faith and Credit Clause in *M'Elmoyle v. Cohen*, 13 Pet. 312 (1839). A short excursion into its origins will demonstrate that *M'Elmoyle* was wrongly decided in a manner strikingly similar to *Swift v. Tyson*, 16 Pet. 1 (1842), overruled, *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Chief Justice Marshall had, in *Hampton v. M'Connel*, 3 Wheat. 234, 235 (1818), applied the Full Faith and Credit Clause, citing *Mills v. Duryee*, 7 Cranch 481 (1813), by stating:

"... [T]he judgment of a state court should have the same credit, validity, and effect, in every other court

6. Contrary to parochial English law, the Continental civil law applies the limitations statutes of the *locus*, rather than the *forum*. Developments in the Law, *Statutes of Limitations*, 63 Harv. L.Rev. 1177, at 1260, n.689 (1950).

However, England now treats limitations laws as substantive rather than procedural for choice of law purposes, under its Foreign Limitation Periods Act 1984. See footnote 16, *infra*, p. 32.

in the United States, which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States." (Our emphasis).

The footnote comment to that ruling states that it remained "open in this court, whether a special plea of fraud might not be pleaded, or a plea to the jurisdiction of the court in which the judgment was obtained; for these might, in some cases, be pleaded in the state court to avoid the judgment." A plea of limitations in the forum was not stated as a possible exception.

Then in 1820, Justice Story sitting as circuit justice in the Circuit Court, District of Massachusetts, decided *Le Roy v. Crowninshield*, 15 F.Cas. 362, 2 Mason. 151 (1820), where the contract made in New York and barred by limitations in New York, was held not to be barred in the Massachusetts federal court. The scholarly study by Justice Story was predicated entirely on the English law of comity among foreign sovereign nations, which classified limitations as not affecting the right, only the remedy. The constitutional implications were not mentioned or ruled upon, presumably due to the judicial philosophy of federal courts later embodied in *Swift v. Tyson*.⁷

His opinion concedes:

"... I can perceive no reason why the right to use that [limitations] defence, good by his own laws, should not travel with the debtor into every other country. . . ." (15 F.Cas. at 368).

7. Cf., Pielemeier, *Why We Should Worry About Full Faith and Credit to Laws*, 60 So. Calif. L.Rev. 1299, at 1318 (1987).

"... a statute, therefore that takes away all remedy upon a contract cannot be truly said not to affect the right, or obligatory force, of such contract. . ." (15 F.Cas. at 369).

"... I am not aware that in any exact legal sense a right can be said to subsist upon a contract, where the law has taken away all the power of enforcing its obligation by any remedy." (15 F.Cas. at 370).

Justice Story applied England's restrictive law of comity, that limitations did not affect the "right", however, because "The error, if any has been committed, is too strongly engrafted into the law to be removed without the interposition of some superior authority." (15 F.Cas. at 371).

By the time *M'Elmoyle v. Cohen* was decided in 1839, upon a certificate of a division of opinion among the judges of the sixth Circuit Court, the common law restrictive rule of comity, classifying limitations as not affecting the right but only the remedy, had become dominant. The opinion answers the full faith and credit issue with the arbitrary formula that limitations "is a plea to the remedy; and, consequently, that the *lex fori* must prevail." (Citing *Le Roy v. Crowninshield*, 2 Mason. R. 351, and other similar decisions which did not consider the constitutional issue.) [13 Pet. at 326]. The sovereignty of foreign, independent nations, and reliance on English cases reflecting its parochial jealousy as a sovereign kingdom, was thought to justify the rule. (13 Pet. at 326-7).

Chief Justice Marshall's all-encompassing ruling which would have allowed pleas to defeat the claim only if allowed in the state where the claim arose, but "none

others", *Hampton v. M'Connel*, supra, was essentially treated as dictum, citing technical common law pleading rules and an irrelevant quotation from *Story's Commentaries*. (13 Pet. at 326).

Townsend v. Jemison, 9 How. 407 (1850), without mentioning any constitutional question, applied the limitation of the forum, Alabama, rather than the shorter limitation of Mississippi where the obligation arose, upon the same English rule of comity. The opinion sought to dispel the force of Justice Story's reasoning in support of a different rule in *Le Roy v. Crowninshield*, in part by observing that statutes limiting time for recovering property, such as Virginia's "five years' bona fide possession of a slave", did affect the "right" and were thus different from limitations which "only take away remedies". (6 How. at 419).⁸

It becomes evident to a certainty from these decisions that the English common law of comity was applied to a constitutional full faith and credit issue without examination of the underlying policies. By this means, an artificial and arbitrary doctrine that limitations laws affect only the "remedy" and not the "right", originally intended to preserve a greater sovereignty for England's own laws, entirely governed the application of the Full Faith and Credit Clause of our Constitution.⁹

8. The view that limitations statutes affect only remedies, not rights, was later used in *Campbell v. Holt*, 115 U.S. 620 (1885), to justify the constitutionality of the Texas legislature's extending a limitations statute after the original period of time had expired. While adhering to the result of that case in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), Justice Jackson writing for a unanimous Court described that reasoning as "unsatisfactory rationalization." 325 U.S. at 314.

9. Justice Jackson's classic essay, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Colum. L.Rev. 1, 30 (1945), citing *M'Elmoyle v. Cohen*, 13 Pet. 312 (1839), states:

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Contrary to the historical purpose of English comity law distinguishing between remedy and right, the Full Faith and Credit Clause was "designed to transform the several States from independent sovereignties into a single unified Nation. [citing *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980); *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935)]. . ." Justice Stevens, concurring in *Allstate Ins. Co. v. Hague*, 449 U.S. 301, at 322 (1981).

The Wells majority, we suggest, rationalized continuing the *M'Elmoyle* rule by putting the cart before the horse. Whether the Full Faith and Credit Clause comes into play in regard to claims arising in a different state, must depend on whether a limitations law is substantive in nature. If it is, the forum must apply that state's law. Rather than re-examining the ancient fiction that limitations laws are merely procedural or remedial, however, the Court extended that fiction to "built-in" limitations periods as well. The error of *M'Elmoyle* in allowing a parochial, arbitrary and fictional classification by English courts to cripple the Full Faith and Credit Clause was thus perpetuated. The rote acceptance of the *M'Elmoyle* rule in *Wells v. Simonds Abrasive Company*, supra, has left the judiciary in our own age to struggle with its consequences.

The present rule, under *M'Elmoyle* and *Wells*, encourages forum-shopping, as Justice Jackson noted in his *Wells*' dissent. While a law encouraging forum-shopping need not perhaps be invalid for that reason, that pernicious

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"We must beware of transposing conflicts doctrines into the law of the Constitution. This is exactly what appears from the opinions to have been done in several of the cases where exceptions were made as to faith and credit due judgments."

consequence does become relevant to deciding the due process question. A critical element of "fairness" required by due process of law is the normal expectation of parties concerning the laws affecting their rights. The evil of forum-shopping is fully as relevant to the full faith and credit issue. The ability of litigants to obtain different results by hop-scotching among the states is as antithetical to the explicit purpose and command of that Clause as it is to the normal expectation of parties concerning the law which will govern them. A rule of law requiring different results because the claim may be alive or dead, depending fortuitously on the law of a forum, is plainly destructive of sound judicial policy.

The proliferating practice of forum-shopping "via the *forum non conveniens* route" (345 U.S. at 522) is illustrated by *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790 (10th Cir. 1979). This was an action filed in federal district court in Mississippi for recovery on a claim arising in Kansas. The action was barred by Kansas' two year limitations statute, but not if Mississippi's six year statute applied. The action was transferred pursuant to 28 U.S.C. Sec. 1404(a) to the federal district court in Kansas. *Schreiber* found Mississippi's six year statute applicable, because Mississippi state courts would have applied it to the Kansas claim. So our federal court system made the forum-shopping even more convenient than it would have been in state court, allowing the litigants to avoid Kansas law barring the claim but still trying the case in Kansas.¹⁰

10. *Schreiber* was followed in *Goad v. Celotex Corporation*, 831 F.2d 508 (No. 86-3540, 4th Cir. October 16, 1987), where the action was filed in federal district court in Texas to obtain the advantage of its limitations statute. It was then transferred to federal court in Virginia where plaintiffs lived. *M'Elmoyle* and

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But the Third Circuit, in *Ferens v. Deer & Co.*, 819 F.2d 423 (1987), disagreed. Invoking the Due Process Clause and the Full Faith and Credit Clause, Chief Judge Gibbons, for the court's majority, held that a similar action filed in federal court in Mississippi on a claim arising in Pennsylvania, and transferred to federal court in the latter state, must be governed by the limitations statute of Pennsylvania. Citing *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930), and *Allstate Insurance Co. v. Hague*, 449 U.S. 301, 310-11 (1981), Chief Judge Gibbons found that limitations laws must also be governed by the concept that application of a State's law is unconstitutional if it has "only an insignificant contact with the parties and the occurrence or transaction". (819 F.2d at 427). The majority in *Ferens* essentially agreed with the strong academic criticism of *Schreiber* in recent treatises and law review articles. E. Scoles & P. Hay, *Conflict of Laws* 132 (1984); Martin, *Statutes of Limitation and Rationality in the Conflict of Laws*, 19 Washburn L.J. 405, 421 (1980); Grossman, *Statutes of Limitations and the Conflict of Laws: Modern Analysis*, 1980 Ariz. St. L.J. 1, 56-65.¹¹

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Wells were cited as governing. In rejecting the "forum shopping" argument, the court cited diversity and venue statutes as permitting different forums (slip opinion n.12), thereby failing to consider the real evil of a legal rule which necessarily causes different results in different forums.

McVicar v. Standard Insulations, Inc., 824 F.2d 920 (11th Cir. 1987), and *Ridling v. Armstrong World*, 627 F.Supp. 1057, 1062 (S.D. Ala. 1986), also reached the same result as *Schreiber*.

11. In *Warner v. Auberge Gray Rocks, Inn, Ltee.*, 827 F.2d 938 (3rd Cir. September 3, 1987), plaintiff sued in New Jersey where he was domiciled, for injuries suffered in a ski accident in Quebec, Canada. The court applied New Jersey's two year

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The forum-shopping permitted by the present *M'Elmoyle-Wells* rule is a significant factor impeaching its validity, especially since due process requirements were not considered in its formulation or perpetuation. Now that the passing years have confirmed its unhappy results, we can look back in history to see that the rule was wrong to begin with. Applying the simple truth that limitations laws substantively affect parties' rights, and giving full faith to those laws, will correct the error. In that way, a state's governing laws will be uniformly applied wherever they are invoked, thereby avoiding forum-shopping in federal and state courts.

The room for abuse in multi-state class actions is self-evident. *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985) gives the green light to multi-state class actions, which must, however, apply the laws of different states. That constitutional requirement protects federalism by preventing the class action device from becoming a vehicle for forum-shopping. Comment, *Choice of Law and the Multistate Class: Forum Interests in Matters Distant*, 134 U. Pa. L.Rev. 913 (1986); Arthur R. Miller and David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1 (1986). Because such actions will proliferate in the future, great care must be taken to ensure that correct constitutional standards are maintained. If, as *Phillips* requires, Kansas must apply a

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limitation statute, rather than Quebec's one year statute, because plaintiff's domicile gave New Jersey a sufficient interest. New Jersey would thus not apply its own conflicts rule treating limitations periods as substantive for purposes of applying the limitation statute of the jurisdiction where the claim arose. *Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 305 A.2d 412 (1973). *Warner* did not involve the Full Faith and Credit Clause because the injury did not occur in one of the States.

different interest rate required by the law of another state to claims arising therein, is it not fully as important to require application of that state's different limitations law? The Seventh Circuit, in *Beard v. J.I. Case*, 823 F.2d 1095, 1104, n.9 (1987), correctly reasoned that the rationale of *Phillips* "may well apply to foreign laws governing the timeliness of an action, thereby calling into question the broad language in *Wells* and *Clay*."

The solution to our problem seems almost too simple, obvious and compelling. The solution merely requires full faith and credit to be given another state's limitations laws which determine whether a claim is alive or dead. This solution does effectuate the natural expectation of the parties that the laws of a state having no contacts with the claim will not be differently applied to allow a different result. It does prevent forum-shopping. It does prevent the injustice, as in *Wells*, of a defendant escaping liability through application of a shorter limitations period in a different state.

And this very simple rule is also reasonable. It casts out the "patently silly" metaphysical arguments distinguishing between right and remedy, and recognizes the true substantive effect of a limitations law upon the enforceable rights of the parties. Martin, *Statutes of Limitations and Rationality in the Conflict of Laws*, 19 Washburn L.J. 405, 419 (1980). It frees our judicial structure from an arbitrary, magical incantation which was already obsolete at the inception of our Union.

The continuing academic criticism of the existing rule treats limitations law as substantive. Yet some critics suggest that the "forum can assert an interest in barring stale claims from litigation in its courts, and this interest

is furthered if the forum applies its own shorter statute of limitations." Grossman, *Statutes of Limitation and the Conflict of Laws: Modern Analysis*, 1980 Ariz. L.J. 1, 17-18; Martin, *Constitutional Limitations on Choice of Law*, 61 Cornell L.Rev. 185, 221 (1976). Such a dismissal in the forum, it is said, would not be on the merits, apparently permitting suit to be refiled where the claim arose. R. Weintraub, *Commentary on the Conflict of Laws*, Sec. 9.2B, p. 515. This approach appears to be a partial concession to an existing irrational rule, as though the rule might not otherwise be altered by the courts. Attributing a significant local interest of the forum in a claim to be governed by another state's law seems theoretical in the extreme.¹²

The true interest of a State, and its only interest, is in regulating the time for claims which its own law governs. Why should the forum's limitations law, whether longer or shorter, affect the result which would necessarily occur had suit been brought where the claim arose? In either event, applying the forum's limitation is improper because it determines the outcome of a claim as to which

12. A number of state legislatures over the years have enacted "borrowing statutes" intended to apply the other state's limitations law, as a matter of local law, to remedy the plain injustice and forum-shopping resulting from the judiciary's conflicts rule. But these vary, and are inconsistently applied, as exemplified by the Kansas court in this case. See Grossman, *Statutes of Limitations and the Conflict of Laws: Modern Analysis*, 1980 Ariz. St. L.J. 1, 14

A proposed redraft of Restatement (Second) of Conflict of Laws, Sec. 142 (Draft April 15, 1986), along these lines would revise the existing rule into a form of "borrowing", and is nearly as unsatisfactory as "borrowing" statutes have been:

"Sec. 142. Statute of Limitations. An action will be maintained if it is not barred by the statute of limitations of the forum unless the action would be barred in some other state which, with respect to the issue of limitations, has a more significant relationship to the parties and the occurrence."

the forum has insufficient contact to apply its own governing law. It could as well be argued that the forum has an interest in not barring "fresh" claims (its limitation period being longer than the *lex loci*) as in barring "stale" claims (its limitation period being shorter). We do not subscribe to the concept, the shorter the better, applied to limitations laws, which these scholars implicitly suggest be given constitutional stature. It is for the state creating a claim to specify the period for enforcing it. Nor would it normally be practicable, even if possible, to commence another lawsuit in the other state after being barred by the shorter limitations statute of the forum.¹³

So far as due process is concerned, the expectation of the parties as to governing law relates to the State having significant contacts concerning the claim. So far as full faith and credit is concerned, the same result

13. The result of adopting such a half-way solution to the problem also demonstrates its weakness. Under that scenario, which would presumably allow refiling the suit where the claim arose, logic requires that the barred action may also be brought anew in any other state with a limitations period as long as that of the state where the claim arose.

And if a forum state be permitted to apply its own limitations law, whether longer or shorter, consistency would compel that an action dismissed by the state where the claim arose could be brought anew in a forum state having a longer limitations period.

These consequences demonstrate the inadequacy of the partial solution suggested by proponents which would permit the forum state to apply its shorter limitations statute. Only by consistently treating the limitations issue as substantive, i.e., applying the limitation period applicable in the state where the claim arises, can these illogical and impracticable results be avoided.

The solution which we maintain is required by the Constitution also lends harmony and simplicity to this area of conflict of laws. It carries out the purpose of the Full Faith and Credit Clause in bringing an end to litigation—a policy of finality. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 288 (1980, Justice White, concurring).

is mandated. In neither event is the relative length of the limitations laws in the two States material.¹⁴

The uniformity required by the Full Faith and Credit Clause admits of no exception by which the local policy of the forum may so substantially affect the enforcement of the foreign claim. Justice Stone's language in *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 276-277 (1935), supports this conclusion:

"The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin. That purpose ought not lightly to be set aside out of deference to a local policy which, if it exists, would seem to be too trivial to merit serious consideration when weighed

14. The Uniform Conflict of Laws-Limitations Act approved in 1982, and adopted in four states, treats limitations as substantive. Section 2 requires the limitations law of the state where the claim arose to be applied, whether shorter or longer, subject to a vague "fairness" provision in Section 4. It replaced what was found to be an unacceptable form of "borrowing" statute in the Uniform Statute of Limitations on Foreign Claims Act proposed in 1957. The Committee's Prefatory Note referred to the difficulty and confusion caused by existing "borrowing" statutes in the states having them, concluding:

"The consensus was that limitations laws should be deemed substantive in character, like other laws that affects the existence of the cause of action asserted." 12 U.L.A. 50 (1987 Supp.).

See discussion in Cooper, *Statutes of Limitations in Minnesota Choice of Law: The Problematic Return of the Substance-Procedure Distinction*, 71 Minn. L.Rev. 363, 384, 388-391 (1986).

Once limitations laws are properly classified as substantive, the federal Constitution itself requires this uniform solution.

against the policy of the constitutional provisions and interest of the state whose judgment is challenged."

An early distinguished jurist, Livingston, J., dissented from New York's application of its shorter limitations law on a claim arising in Connecticut in *Nash v. Tupper*, 1 Caines 402 (N.Y. 1803), basing his view on natural reason, logic and common sense. Pointing out that an interest rate of 7% valid in another state would be enforced though it was usurious in New York, he saw "no reason why the same respect should not be paid to the limitation acts of another state." (1 Caines at 414). His lucid comments on the expectation of the parties and its relationship to consensual limitations, though not based on constitutional issues, are *apropos* in light of this Court's holding in *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930), requiring recognition of contractual limitations in the non-forum state. The parties, Justice Livingston said, could validly contract for a limitation period. Even absent such a contract, a consensual expectation existed:

"... I perceive but little if any difference between a written contract of this kind, and a case in which the defendant must be presumed to have had in his eye, the laws of his own state, and, therefore, have virtually agreed to pay these notes, if sued within that period. To leave his state, therefore, prior to that time, and then set up a defence in violation of his own engagement, and the understanding of the plaintiff, is an injustice which ought not to be suffered, if, without a breach of duty, we can prevent it. It may be said that if a party becomes a suitor with us, he must be bound by our laws. This is true, as it respects the form of action, or mode of obtaining

the remedy. . . . The present defence is a perpetual bar to the action, and, therefore, involves in it the merits, and not a mere question of form. . . . It would not be easy to assign a reason why an obligation incurred in one state should be cancelled by either of the parties flying to another. We are not, in my opinion, under the necessity of establishing a principle or practice which may so easily be abused, and must always be followed by great injustice. . . ." (1 Caines at 415-416).

The similar reasoning in Justice Jackson's dissent in *Wells* 150 years later applied specifically to the Full Faith and Credit Clause: "The whole purpose and the only need for requiring full faith and credit to foreign law is that it does differ from that of the forum. . ." and requires "that the law where the cause of action arose will follow the cause of action in whatever forum it is pursued." (345 U.S. at 521). His conclusion that *Wells'* encouragement of forum-shopping "opens up possibilities of conflict, confusion and injustice greater than anything *Swift v. Tyson* . . . ever held" (345 U.S. at 522) is being proved daily in our courts.¹⁵

15. Justice Jackson's essay, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Colum. L.Rev. 1, 7 (1945), discusses how judicial philosophy during the *M'Elmoyle-Tyson* era affected the problem at hand:

"Meanwhile the slavery question had begun to distort men's views of government and of law. Talk of 'state sovereignty' became involved in the issue. The Taney Court wrote in a spirit hard to reconcile with the spirit of the short but uncompromising opinion written for the Marshal Court by Mr. Justice Story. [citing *M'Elmoyle v. Cohen*, 13 Pet. 312 (1839), and referring to Justice Story's opinion in *Mills v. Duryee*, 7 Cranch 481 (1813)]. Although he was still a member of the Court, he did not dissent. Perhaps he dis-

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The comparison with *Swift v. Tyson*, decided in 1842 by the same Court which decided *M'Elmoyle* in 1839, is apt. For in *Swift*, a technical, overly restrictive construction of the Judiciary Act of 1789 unconstitutionally allowed a philosophy of general federal common law to displace state law in federal diversity actions; while in *M'Elmoyle* a technical English doctrine at odds with the very concept of a federal Union¹⁶ permitted evasion of the direct command of Article IV, Sec. 1 of the Constitution by displacing another state's governing law with that of the forum. Both have led to "conflict, confusion and injustice."

In *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), this Court faced the argument that a federal court sitting in equity was not required to follow the limitations statute of the state where it sat, and which the state court would

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agreed, as he frequently did, with his associates who were products of the Jacksonian era, but did not carry the difference beyond the conference room. Perhaps he was placated by being several times cited as an authority."

16. England's common law on the subject was changed by its Foreign Limitation Periods Act 1984, after The Law Commission "recommended that all limitations statutes, English or foreign, be regarded as substantive and not procedural for the purpose of the choice of law."

That Act requires the limitation law of the foreign country to be applied to claims arising under the laws of such country; and English limitations law is not to apply, except when English law is also applicable to the claim itself. Josling, *Foreign Limitation Periods Act 1984*, 129 *Solicitors' Journal* 631 (Sept. 13, 1985).

Treating limitations acts as substantive, the Act also requires a foreign judgment dismissing a claim as barred by limitations to be final and conclusive, contrary to the old common law rule which would have allowed a new action in England if the latter's limitation period were longer. 129 *Solicitors' Journal*, at 632.

apply to the same cause, because limitations laws are "remedial only." This argument was rejected:

"... The question is whether such a [limitations] statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State Court?" (326 U.S. at 109).

The "outcome-determinative" test demonstrated that limitations laws were substantive, that the law declared by a State "ought to govern in litigation founded on that law" whether the forum of application is a State or a federal court. (326 U.S. at 112).

The Full Faith and Credit Clause implements the Constitution's design to transform the States into a unified Nation "by directing that a State, when acting as the forum for litigation having multistate aspects or implications, respect the legitimate interests of other States and avoid infringement upon their sovereignty." Justice Stevens concurring in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, at 322-3 (1981). The policies of *Erie R. Co. v. Tompkins* could only be effectuated by recognizing limitations statutes as "substantive". The equally important constitutional policies of the Due Process Clause and the Full Faith and Credit Clause can only be carried out by recognizing the same reality, that limitations laws are substantive in nature because of their governing impact upon the claim asserted. *M'Elmoyle* and *Wells*, should

be overruled because "no lapse of time or respectable array of opinion should make us hesitate to correct" their unconstitutional effect. *Erie R. Co. v. Tompkins*, 304 U.S. at 79.

The overruling of *M'Elmoyle and Wells* is needed in order to carry out the supreme command of our Constitution, and in order to provide a consistent, realistic framework for constitutional law as it is applied in the future.¹⁷

Due process of law, not considered in those cases, in any event requires the same result. "Fairness" means that limitations laws, being outcome-determinative, must be treated for constitutional due process purposes as substantive in nature. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778, n.10 (1984), left this issue open for decision in an appropriate case.¹⁸ While the two con-

17. "Full faith and credit cases are in disarray. Choice of law considerations blend into and become intermingled with jurisdictional minimal contacts notions. . . . A return to greater doctrinal clarity is overdue." Peter Hay, Full Faith and Credit and Federalism in Choice of Law, 34 Mercer L.Rev. 709, 716 (1983).

18. In *Keeton*, this Court referred to "considerable academic criticism" of the existing rule, but found it "unnecessary to express an opinion at this time as to whether any arguable unfairness rises to the level of a due process violation." 465 U.S. at 778, n.10. On remand, *Keeton v. Hustler Magazine, Inc.*, 828 F.2d 64 (1st Cir., September 11, 1987), certified to the Supreme Court of New Hampshire two issues, one of which was whether New Hampshire would permit recovery for libel in other jurisdictions whose limitations statutes had run. The purpose was to obtain a ruling which might avoid the necessity of deciding the federal constitutional issues, should New Hampshire apply foreign limitations statutes to claims arising in the other states.

Free speech, as well as full faith and credit concerns, arise in multi-state libel cases, because "application of the forum's [longer] statute of limitations imposes speech-inhibiting laws . . ." which would "abrogate the home state's sovereignty." Pielemeier, Constitutional Limitations on Choice of Law: The Special Case of Multistate Defamation, 133 Penn. L.Rev. 381, at 434 (1985).

stitutional clauses supplement each other, their purposes are not the same. The one commands "full faith" to a sister state's laws applicable to the parties. The other requires "fairness" in not applying any state's laws which do not fairly apply to the dispute. Aside from this frequently overlapping constitutional protection, the due process requirement alone, as expounded in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), requires limitations laws to be treated as substantive in the same manner as other laws relating to liability or the extent thereof.

II.

The Judgment Below Violates the Due Process Clause and the Full Faith and Credit Clause by Applying the Kansas Theory of Interest Law to Claims Arising in Other States

This Court, in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), reversed the Kansas court's application of Kansas contract and equity principles to claims arising in other states, because their laws apparently conflicted with Kansas law. Kansas utilized interest rates far higher than those of Texas, for example. This Court observed that, while Texas recognizes interest liability for suspended royalties,

" . . . Texas has never awarded any such interest at a rate greater than 6% which corresponds with the Texas constitutional and statutory rate. Tex. Const. Art. 16, Sec. 11; Tex. Rev. Civ. Stat. Ann., Art. 5069-1.03 (Vernon 1971). See *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (Tex. 1978); *Phillips Petroleum Co. v. Adams*, 513 F.2d 355. . ." (472 U.S. at 817).

In *Shutts*, Kansas had applied its equitable theory of unjust enrichment, adopting federal law so as to assess a higher rate of interest than Kansas interest statutes provided. (679 P.2d at 1175, 1180). That federal law, 18 C.F.R. §154.102, was designed to implement federal regulation of natural gas by putting the time-cost of funds, consisting of rate increases collected but found unreasonable and thus refundable, upon the natural gas companies collecting those funds. This served to deter them from collecting rate increases not likely to be approved by the Federal Energy Regulatory Commission. The federal regulation did not apply to funds representing lawful, non-refundable rate increases nor to the companies' contractual duties to pay royalty to gas lessors on these proceeds of sale.¹⁹

Yet the Kansas Supreme Court after remand by this Court in *Phillips*, found that Texas' 6% rate was not applicable to claims arising in Texas, stating that "No Texas court ever mentioned the higher rates set by federal regulations. . .", and concluding that "This issue has not been determined by the Texas Supreme Court." (732 P.2d at 1298). Then it decided that all jurisdictions involved, including Texas, would apply equitable principles adopting federal interest rates, as Kansas had, because these "funds

19. 18 C.F.R. §154.102(c) provided, in pertinent part:

"(c) Refunds. (1) Any independent producer that collects rates and charges pursuant to this section shall refund at such times, in such amounts to the persons entitled thereto and in such manner as may be required by final order of the Commission the portion of any increased rates or charges found by the Commission in that proceeding not to be justified, together with interest thereon as required in paragraph (c) (2) of this section"

The rate established was nine percent simple interest per annum from October 10, 1974, to September 30, 1979; and thereafter was the average prime rate for each quarter compounded quarterly.

held by Phillips as stakeholder originated in federal law and are thoroughly permeated with interest fixed by federal law in the FPC regulations. . ." (732 P.2d at 1313). In this *Wortman* case, remanded for further consideration in light of *Phillips*, the Kansas court adopted the foregoing ruling. (J.A. 150; 734 P.2d at 1193).

But Texas has deliberately applied its state interest rate to suspense royalty obligations, rather than adopting the federal interest rate for state law purposes as Kansas had. In *Stahl*, 569 S.W.2d at 484, the Texas Supreme Court cited the federal regulations governing suspense funds and refund obligations, including 18 C.F.R. §154.102. *Stahl* also quoted from and approved *Phillips Petroleum Company v. Adams*, 513 F.2d 355 (5th Cir. 1975), which had mentioned Phillips' duty to pay the then 7% federal rate on refunds to purchasers, but nonetheless applied Texas 6% rate to the similar case before it. *Stahl* also cited the very first *Shutts* case from Kansas which had adopted the federal rate [222 Kan. 527, 567 P.2d 1292 (1977)], without suggesting Texas should ignore its own state interest rates. (569 S.W.2d at 484, 485; and see 513 F.2d at 366).

After this Court's remand of *Shutts*, Texas re-affirmed that *Stahl* required the 6% rate to be applied whether the recovery was in contract or equity, and that higher "equitable" rates were impermissible. *Mo.-Kan.-Tex. R. Co. v. Fiberglass Insul.*, 707 S.W.2d 943, 947 (Tex. Civ. App. 1986, Error Refused, NRE, 1986):

"We conclude that *Stahl* allows courts to award prejudgment interest on equitable grounds at the six percent legal rate of art. 5069-1.03 when no statute provides for such a recovery. It thus enlarges the

class of cases in which prejudgment interest may be granted without increasing the rate of equitable prejudgment interest that may be awarded."

But the case was ignored by the Kansas court in deciding *Shutts* and *Wortman* on remand.

In applying its own constitutional and statutory 6% rate to a case legally identical to this, the Texas court was thus specifically cognizant of the federal regulation specifying a higher rate, but did not see fit to adopt federal law as a part of its state law, in these circumstances. Yet Kansas now disregards Texas law, upon the specious theory that Texas did not discuss the Kansas theory substituting the federal rate for the state rate, in an identical dispute governed by state law.²⁰

In short, Kansas now propounds the unconstitutional doctrine that it need not apply the governing law of another state on an identical claim, if the forum state can conceive of theories not specifically stated and ruled upon

20. Using the same specious reasoning, the Kansas Court disregarded the 6% rate established in Oklahoma and the 7% rate in Louisiana, which this Court observed were in apparent conflict with Kansas law. (472 U.S. at 817).

Louisiana, however, does not impose liability for interest in these royalty cases. *Whitehall Oil Company, Inc. v. Boagni*, 217 So.2d 707, 712, affirmed, 229 So.2d 702 (La. 1969). The Kansas court's contrary conclusion, that Louisiana law was "confusing" and thus that "equity" must decide the case (*Shutts v. Phillips Petroleum Co.*, 240 Kan. 764, 732 P.2d 1286, at 1303, 1307), plainly disregards the only Louisiana gas royalty interest case in point.

Oklahoma has a statute providing that acceptance of payment of the whole principal, as such, "waives all claim to interest." 23 Okla. Stat. Ann. §8 (1981). This statute on its face bars liability because Sun advised the royalty owners it was paying the principal, which was accepted. (J.A. 67).

by the other state in arriving at its rule of law. Given clear statutory law and judicial precedent, a forum state cannot be permitted to evade the existing, governing law by determining that the forum state has developed preferable legal theories which the other state would follow if more fully presented to its courts. Otherwise, the constitutional limitations upon states having insignificant contacts with the claims in suit can be avoided and rendered for naught by theories of what the other state's law ought to be, rather than what it is. It is just as wrong to permit the forum state to thus impose its own preferences upon other states, as it is to permit a federal court in Texas, for example, to ignore governing Texas state law by imposing its own equitable theories. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

The Kansas court was not merely "candidly construing" another state's statute, resulting in what might or might not be an "error of construction". *Pennsylvania Fire Ins. Co. v. Gold Issue Min. & M. Co.*, 243 U.S. 93, 96 (1917); *Kryger v. Wilson*, 242 U.S. 171, 176 (1916). Rather, Kansas has gone far beyond attempting candidly to apply specific state statutes and decisions, by exporting its own theory that a state should adopt federal law as state law, in the face of different rates specified by state constitutions, statutes and judicial decisions.

The result is precisely the same as that which this Court found constitutionally impermissible in *Phillips*. It is just such extraterritorial export of a State's own laws which "risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause . . . to prevent." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980).

No better summary of the Full Faith and Credit Clause has been written than Justice Jackson's Cardozo Lecture²¹ which sees in that Clause a "visionary grandeur".²² In it, Justice Jackson referred to the absence of guidelines in the existing decisions, recommending that courts:

"candidly recognize that choice-of-law questions, when properly raised, ought to and do present constitutional questions under the full faith and credit clause [Note 108: Or, in some cases perhaps, under the due process clause] which the Court may properly decide and as to which it ought at least to mark out reasonably narrow limits of permissible variation in areas where there is confusion."²³

Justice Stone wrote for the Court in *Pacific Employers Ins. Co. v. Industrial Accident Comm'n.*, 306 U.S. 493, 502 (1939), to the same effect:

This Court must determine for itself how far the full faith and credit clause compels the qualification or denial of rights asserted under the laws of one state, that of the forum, by the statute of another state."

Whatever laudable motives inspired the sweeping conclusion that Kansas' theory of interest should uniformly apply in all states, it remains undeniable that those states have not remotely suggested they would adopt federal law to replace rates specified in their statutes and constitutions. Neither lofty motives nor subjective good faith can justify the application of Kansas contract and equity

21. Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Colum. L.Rev. 1 (1945).

22. Louis L. Jaffe, Mr. Justice Jackson, 68 Harv. L.Rev. 940, 958-9 (1955).

23. 45 Colum. L.Rev. at 27.

law, under the guise of a construction which is nothing more than a prediction that other states would change their existing law to conform to the Kansas theory.

Kansas should not be allowed, so transparently, to exceed the constitutional limit on its power on an issue which it considers important. Otherwise, every other state would be so entitled concerning areas of special interest to each. Substantial and continuing erosion of the Constitution would inevitably result.

The Full Faith and Credit Clause in implementing our federal union does not intrude upon the sovereignty of the states. Rather it preserves to each state its own rightful sovereignty over disputes which its law governs, by obliging "each state . . . to give due deference to the laws of other states". In order to effectuate this constitutional command in this case, a standard must be articulated, a "set of outer limits" must be imposed, striking down Kansas' refusal to apply the governing law of other states. Within those limits, lower courts can proceed in good faith to determine applicable law.²⁴

The standard needed in this case is evident. The "outer limits" are clear. Kansas cannot export its theory adopting federal interest rates for purposes of state law, to other states which have declined to do so, when those states have enacted their own statutes, and have laid down their own laws which differ from Kansas law. Kansas cannot export its own concepts of "equity" to

24. Hay, Full Faith and Credit and Federalism in Choice of Law, 34 Mercer L.Rev. 709, 722, 728 (1983).

See also, Pielemeier, Why We Should Worry About Full Faith and Credit to Laws, 60 So. Calif. L.Rev. 1299, at 1329, 1337 (1987).

all other states in the form of a federal common law, in a manner reminiscent of *Swift v. Tyson*.

Kansas must, therefore, give deference to the 6% rate of interest fixed in Texas for Sun's 1978 royalty payout; and to the laws of Louisiana and Oklahoma which do not impose liability for interest at all.

CONCLUSION

The Full Faith and Credit Clause and the Due Process Clause require Kansas to apply the limitations statutes of the states in which plaintiff class members' claims for interest arose. The limitations statutes of Texas, Oklahoma and Louisiana bar claims arising in those states as a result of the July, 1976, payout by Sun, because this suit was not commenced until August 23, 1979. The judgment below should be reversed and vacated, with instructions to enter judgment for Sun Oil Company on those claims.

Phillips Petroleum Company v. Shutts, 472 U.S. 797 (1985), specifically required Kansas to apply the interest laws of the other states in which plaintiff class members' claims arose. With respect to those claims arising in Texas, Kansas imposed its own theory adopting federal law as to rate of interest. It has denied Sun's constitutional right to application of the 6% rate required by Texas law. Kansas imposed its own theory to claims from Louisiana and Oklahoma, which do not impose liability for interest under the circumstances; and whose rates, if liability did exist, were only 7% and 6% per annum, respectively.

Kansas cannot be permitted to evade the existing law of other states under the guise of predicting that

those states would, like Kansas, adopt inapplicable federal law in the place of existing state law, to claims governed by state law. Under this standard, the judgment below should be reversed and vacated as to all claims arising from Sun's 1978 payout in Texas, Oklahoma, and Louisiana, with instructions to enter judgment against Sun Oil Company for interest on the Texas claims at the rate of 6% per annum; and to enter judgment for Sun on the Oklahoma and Louisiana claims.

Respectfully submitted,

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